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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965.

No. 809

WINCHESTER DRIVE-IN THEATRE, INC.,
SYUFY ENTERPRISES, INC.,
RANCHO DRIVE-IN THEATRE, INC., and
BELL DRIVE-IN THEATRE, INC.,
Petitioners,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION,
BUENA VISTA DISTRIBUTION CO., INC.,
METRO-GOLDWYN-MAYER, INC., and
PARAMOUNT FILM DISTRIBUTING CORPORATION,
Respondents.

WINCHESTER DRIVE-IN THEATRE, INC.,
SYUFY ENTERPRISES, INC.,
RANCHO DRIVE-IN THEATRE, INC., and
BELL DRIVE-IN THEATRE, INC.,
Petitioners,

vs.

BLUMENFELD ENTERPRISES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PRELIMINARY STATEMENT

This reply brief is filed not for the purpose of repeating the points made in the Petition, but to discuss certain points made by respondents in their joint brief in opposition, indicating thereby reasons for granting the writ.

There are four short arguments to be made here. The first is to emphasize the clear conflict in the circuits on the fundamental issue of which law, state or federal, governs the validity and extent of a release given in an antitrust action, a point raised by the Petition but totally ignored in the brief in opposition. The second point is to make clear that the Court of Appeals had the benefit of the case of *Aro Manufacturing Co., Inc. v. Convertible Top Replacement Company, Inc.*, 377 U.S. 476 (1964), and that the Court of Appeals summarily rejected, even as an alternative, a rule based upon factual inquiry. The third argument is that the district court in this case "legislated" no more or less than the Court of Appeals. The final argument points out the fallacy in respondents' contention that the so-called Prosser rule will discourage settlement of cases because of "uncertainty".

I

RESPONDENTS DO NOT DISPUTE THE EXISTENCE OF A CLEAR CONFLICT IN THE CIRCUITS ON THE FUNDAMENTAL ISSUE OF WHICH LAW, STATE OR FEDERAL, GOVERNS THE VALIDITY AND EFFECT OF A RELEASE GIVEN IN A FEDERAL ANTITRUST ACTION.

The Court of Appeals is the first federal appellate court to hold that federal law governs the validity and

effect of a release given in an antitrust action (Appx. A to Pet., pp. iv, v). That holding clearly conflicts with two holdings in the Second Circuit. *Vines v. General Outdoor Advertising Company,* 171 F.2d 486 (2d Cir. 1948); *Eagle Lion Films v. Loew's, Inc.,* 219 F.2d 196 (2d Cir. 1955). The uncertainty generated by these conflicting decisions is compounded by the case upon which respondents principally rely, *Dura Electric Lamp Co. v. Westinghouse Electric Corp.,* 249 F.2d 5 (3rd Cir. 1957) In that case the issue was posed by the Court but left unanswered, owing to the supposed sameness of the federal and state law.

Respondents have ignored this conflict. While petitioners agree with the determination of the Court of Appeals on this limited issue, petitioners are not precluded from pointing out to this Court the potential uncertainty resulting from that decision. In the present state of the law, an appellate court in any but the Second and Ninth Circuits would have good authority for deciding this question either way.

II

PETITIONERS' VIEW THAT THE FEDERAL RULE SHOULD BE BASED UPON A FACTUAL INQUIRY WAS PRESENTED TO THE COURT OF APPEALS AND SUMMARILY REJECTED.

Respondents intimate at page 7 of their brief that the *Aro* case and the Prosser rule were not presented by petitioners for the consideration of the Court of Appeals.[1]

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[1] *Aro* was not decided by this Court until after this proceeding had been briefed, argued and submitted to the District Court.

The *Aro* case covers pages 20 and 21 of petitioners' (there appellees') brief in the Court of Appeals. The case was relied upon heavily by petitioners for the proposition that a factual inquiry into intent and consideration paid for the release should be the basis of the "new" federal rule. The Court of Appeals disposed of *Aro* with a short quotation and a characterization of an "e.g." therein as a citation with approval (Appendix A, pp. ix, x).

Other cases cited by petitioners in the Court of Appeals for the proposition that an analysis of intent and consideration should be the foundation of the federal rule were rejected summarily by the Court of Appeals which "distinguished" the cases on the ground that they dealt with the interpretation of an ambiguous release in which the issue was what claims were, rather than what parties were, covered by the instrument.

Indeed, the Court of Appeals did not even set out the *Aro*-Prosser rule proposed by petitioners as one of the alternative rules from which it could choose (see Appendix A, p. vi).

Thus, the Court of Appeals by adopting a rule which makes the effect of the release depend solely upon the language and not upon realities effectively disregarded this Court's decision in *Aro* that substance, not form, determines the effect of a release upon joint tort-feasors. Hence, the incongruity discussed in the Petition.

III

THE COURT OF APPEALS ACCUSES THE DISTRICT COURT OF JUDICIAL LEGISLATION WHILE IT ITSELF IS LEGISLATING; THE EVOLUTION OF THE LAW TO SUIT CHANGED CIRCUMSTANCES AND NEW PURPOSES IS NOT LEGISLATION IN THE SENSE OF A USURPATION OF THE FUNCTION OF CONGRESS BUT IS A DUTY OF JUDICIAL DECISION MAKING.

The Court of Appeals condemns the efforts of the district court to reconcile the old joint tort-feasor rule with the nation's antitrust policy as an incursion into "the province of legislative concern". (Appendix A, p. vi). The Court of Appeals also condemns a "selection process" which "resulted in the adoption of a rule" which the Court of Appeals would not affirm. But in reversing, the Court of Appeals employed its own "selection process". The Court of Appeals was not bound by dicta of the Third Circuit in the *Dure Electric* case, *supra,* and could have affirmed the district court's rule, which is certainly more consistent with the holding of this Court in *Aro.* Instead, the Court of Appeals rejected any rule which would accommodate the *Aro* holding, and adopted the Restatement rule. Certainly, in terms of "legislating" this is no different from what the district court did.

The critical difference between the district court and the Court of Appeals in their search for a federal rule from among the competing alternatives was in the philosophy with which that search was undertaken. Thus, the district court stated:

> "In light of the lack of a well-developed federal rule in the antitrust field and in light of the inadequacy of

> the general common law, this Court has a duty to fashion a rule which will further the federal policy of relying heavily on private, rather than public, enforcement of the antitrust laws."
>
> (Appendix B, p. xxv).

But the Court of Appeals as its rationale for the "selection" of the Restatement rule said:

> "Such a rule has the substantial advantages of eliminating disputes as to the intended scope of the release. It discourages chicanery in the negotiation of the release."
>
> (Appendix A, p. viii).

In rejecting the district court's selection of a rule which furthered the enforcement of the antitrust laws through private litigation in favor of a rule which thwarts such private enforcement actions, the Court of Appeals is drawn into irreconcilable conflict with the views of this Court and of the Congress "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws". *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Leh v. General Petroleum Corp.*, 86 S.Ct. 203, 207 (1965). The decision of the Court of Appeals, if left unaltered by this Court, will have the effect of dissuading other federal courts from fashioning rules which further the policy of enforcing the antitrust laws through private actions, just as the decisions of this same Court of Appeals in other case would have had such an effect but for this Court's review of those cases.[2]

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[2]See *Klors, Inc. v. Broadway-Hale Stores*, 255 F.2d 214 (9th Cir. 1958), reversed by unanimous Court 359 U.S. 207 (1959);

This difference of philosophy alone we respectfully submit justifies review of this case by this Court before the conflict spreads further.

IV

ANY UNCERTAINTY CONNECTED WITH THE RULE URGED BY PETITIONERS WOULD DISCOURAGE SETTLEMENT OF ANTITRUST CASES ONLY WHERE GUILTY DEFENDANTS PERSIST IN AN ILLEGAL COMBINATION.

Respondents state in their brief at page 9:

> "Further, they [petitioners] admit that the decision of the court of appeals will eliminate disputes over the effect of a release (Pet., p. 10). But the rule which petitioners now advance would allow the releasor, in every case, to dispute the intended effect of his release. This could only create uncertanty and, therefore, discourage the settlement of antitrust cases."

The alleged uncertainty to which the respondents refer deals only with the effect of a release on non-signatory joint tort-feasors; disputes may arise as between the signatories to a release whether the rule regarding joint tort-feasors is the common law rule or the rule urged by petitioners. It is submitted that a prospective releasee will be concerned about the effect of a release on alleged joint tort-feasors only when he is still in league with them. If they are his competitors and he has no agree-

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Leh v. General Petroleum, 330 F.2d 288 (9th Cir. 1964), reversed by unanimous Court 86 S.Ct. 203 (1965); *Continental Ore v. Union Carbide & Carbon Corp.*, 289 F.2d 86 (9th Cir. 1961), reversed by unanimous Court 370 U.S. 690 (1962); *Simpson v. Union Oil Co. of California*, 311 F.2d 764 (9th Cir. 1963), reversed 377 U.S. 13 (1964).

ments with them, or has discontinued any previous agreements, he will have no stake either in plaintiff's further prosecution of the action or the commencement of a new action. We find it difficult to understand, otherwise, why an antitrust defendant would be discouraged from resolving *its* dispute with plaintiff simply because plaintiff may have a right of additional recovery from others. Respondents' argument, which suggests that there is some unexpressed, implied agency relationship between the releasee and non-signatory co-conspirators, is but an articulation of the "trap" which defendants will ingeniously "spring" if this case is not reviewed.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for Certiorari, petitioners respectfully urge that a writ be issued to review the decision of the Ninth Circuit in this case.

Dated, San Francisco, California,
January 12, 1966.

Respectfully submitted,

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